

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 3, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1957-CR

Cir. Ct. No. 2012CF223

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PHILIP A. LANGE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Philip Lange appeals a judgment of conviction for repeated sexual assault of a child. Lange argues his trial counsel rendered ineffective assistance by failing to object to several of the prosecutor's statements

during opening and closing arguments. Lange alternatively seeks a new trial in the interest of justice. We reject Lange's arguments, and affirm.

BACKGROUND

¶2 Lange exercised his right to a jury trial on one count of repeated sexual assault of a nine-year-old girl, occurring between June 1, 2009 and June 1, 2010, when the victim was age nine. She was twelve years old at the time of trial in July 2012.

¶3 At the beginning of trial, the State played the audio/video recording of the victim's interview at the Child Advocacy Center. She testified next and stated Lange came into her room and made her uncomfortable at least twelve times. In her testimony, the victim did not state where or how she was touched. However, she placed an x where she was touched on a picture of a girl's body. She marked the vaginal region and one breast. She also marked where touching occurred on a male body, placing an x over the male genitalia.

¶4 The victim's mother testified she previously dated Lange and they had lived together on and off. She explained her daughter first reported to her in January 2012 that Lange had touched her. Stacey Kreitz, who had interviewed the victim at the Child Advocacy Center, testified regarding her qualifications and the interview techniques she followed when meeting with the victim. Finally, the victim's twelve-year-old friend testified the victim told her about Lange sexually assaulting her.

¶5 Lange testified that the victim was lying, and he denied ever touching her in a sexual manner. He further asserted the mother had threatened to

accuse him of sexually assaulting her daughter if he did not comply with her demands, such as allowing her to use his debit card.

¶6 Following the jury's guilty verdict, Lange moved for postconviction relief alleging ineffective assistance of counsel. After a *Machner*¹ hearing, the circuit court denied the motion. The circuit court explained it would have sustained objections to some of the State's arguments, but that the failures to object did not rise to the level of deficient performance. Further, the court stated that even if it had found deficient performance, "I still don't see any prejudice whatsoever. Had I ever gotten to the second prong, I think the motion would have failed on the second prong clearly." Lange appeals.

DISCUSSION

¶7 Lange argues his trial counsel was ineffective for failing to object to various statements the prosecutor made during opening and closing arguments. To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. *State v. Smith*, 2003 WI App 234, ¶15, 268 Wis. 2d 138, 671 N.W.2d 854 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *Id.*

¶8 With respect to the prejudice component, a defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Id.*, ¶16. A defendant cannot meet this burden

¹ See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

by merely showing the error had some conceivable effect on the outcome. *Id.* “Rather, [a defendant] ‘must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding[s] would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” *Id.* (quoting *Strickland*, 466 U.S. at 694). However, the prejudice prong is not an outcome determinative standard. *Id.*, ¶17. Whether counsel’s performance was deficient and prejudicial presents a question of law we review de novo. *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶9 Lange argues the collective effect of the prosecutor’s allegedly inappropriate comments undermined the reliability of the trial. In opening argument, the prosecutor stated, “The Child Advocacy Center, a wonderful place ... where children are made to feel safe and comfortable to talk about very difficult things in their lives.” Lange contends the State’s characterization of the center as “wonderful” vouched for interviewer Kreitz’s credibility. Additionally, Lange argues the State vouched for the credibility of all of its witnesses when it argued in closing argument:

But unfortunately in these cases that’s exactly what happened. She was called a liar. You were told that she was lying, that you couldn’t believe the information she gave.

And people wonder why sexual assault victims don’t come forward, and they wonder why it was hard for her to sit here on the stand and talk? *Nobody comes forward with something like this and gets this far before a jury on a lie. Our office doesn’t have time to charge that. Police don’t have time to investigate it.*

(Emphasis added.)

¶10 Lange next asserts the State twice inappropriately argued it believed Lange was guilty. First, in opening argument, the prosecutor argued, “He’s

charged for what he's done.” Then, in closing argument, the State argued, “[T]he only reason we're here today is because of that man. So, there is no sympathy with respect to that. It is his actions that brought us here.” Lange argues these comments assume his guilt and therefore impinge upon his presumption of innocence, constitutional right to confront his accusers, and right to trial.

¶11 Lange also argues the State commented beyond the scope of evidence when addressing the victim's statement during the recorded interview that Lange had licked her vaginal area, touched her breast, and forced her to touch his penis on twelve occasions. Lange contends the prosecutor both vouched for the victim's credibility and inappropriately speculated when stating during opening argument that the assaults happened “not just three times, multiple times, more than twelve times, the State would assert I bet it was way more than that”

¶12 Finally, Lange asserts the State made two arguments having no purpose other than to sway the jury by passion or prejudice. First, in opening argument the State argued the victim “should be out spending summer vacation as a soon-to-be seventh grader in a much different way, but you'll hear the testimony of the defendant's actions and why she needed to be here today.” Lange contends that argument implored the jury to punish Lange for compelling the victim to testify. Second, in the State's closing argument, the State argued, “[A]nd you're not the peer. You are not a peer for that man. Did you hear? Six prior convictions.” Lange argues this statement improperly invited the jury to look down on him.

¶13 Lange bases his argument on *Smith*. There, we summarized the applicable law as follows:

The line between permissible and impermissible final argument is not easy to follow and is charted by the peculiar circumstances of each trial. Whether the prosecutor’s conduct during closing argument affected the fairness of the trial is determined by viewing the statements in the context of the total trial. The line of demarcation to which we refer is thus drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence. Argument on matters not in evidence is improper.

Id., ¶23 (citations and quotations omitted).

¶14 In *Smith*, the defendant argued the following closing argument by the State was improper:

See, this argument—While defense attorneys try and say, well, we’re not saying the police are lying; what else are they saying? There’s no other reasonable explanation, and it kind of frustrates me knowing and working in this field and knowing these officers; and you know them now too. You know them. They work hard. They do a tough job. They come in here to testify a lot of times. They work long, long hours. You weigh their testimony against the defendant’s.

Id., ¶12. We agreed that argument “unfairly referenced matters not in the record and vouched for the credibility of the police witnesses.” *Id.*, ¶26. We then held that because the jury’s determination on credibility was critical and a close call, the prosecutor’s closing argument was prejudicial.² *Id.*, ¶¶22, 25-26.

² The State argues *Smith* is inapposite because there the circuit court had failed to conduct a *Machner* hearing, whereas that is not the case here. Although the State is correct that we remanded for a determination on the deficiency prong, we did resolve the prejudice prong in *Smith*, and that is the holding on which Lange relies. See *State v. Smith*, 2003 WI App 234, ¶26, 268 Wis. 2d 138, 671 N.W.2d 854.

¶15 Lange argues his prejudice argument is even stronger than that in *Smith*, both because there were multiple inappropriate comments here and because one of the comments—the one asserting that nobody gets before a jury on a lie—is “far worse than” the objectionable statement in *Smith*. The problem with Lange’s argument, however, is that he fails to tie it to the facts of his own case. The holding in *Smith* was fact specific, as is every prejudice determination. There, we explained, “[B]ecause of certain evidentiary deficiencies and inconsistencies, the pendulum of fairness hung in equipoise.” *Id.*, ¶19. We then reviewed the factual issues in detail and concluded, “These evidentiary circumstances are significant because they demonstrate how close the credibility call was in this case for the jury. Credibility hung in the balance. The slightest wisp of influence could have directed the course of the jury’s determination.” *Id.*, ¶22.

¶16 Here, on the other hand, Lange’s prejudice argument is conclusory and undeveloped. He explains why he believes each of the comments was improper, but he never develops the facts or explains how this was a close case. For example, we do not know whether there were any inconsistencies in the victim’s statements or testimony. Indeed, Lange tells us precious little of what she said in the recorded interview, and nothing of her demeanor. All Lange really tells us is that the victim claimed the assaults happened, and he claimed they did not. While credibility was clearly an issue, Lange fails to demonstrate it was a close issue.

¶17 The State, in contrast, argues Lange ignores strong evidence presented at trial, “perhaps the most damaging of which was an hour-long interview with the victim, ... in which she provided a detailed account of the assaults, later corroborated by her [trial] testimony” Lange does not refute this account in his reply brief. *See Charolais Breeding Ranches, Ltd. v. FPC Secs.*

Corp., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶18 We conclude Lange fails to meet his burden to demonstrate prejudice from the State’s allegedly improper statements during opening and closing arguments. Accordingly, while most of the State’s statements were likely proper when considered in context, we need not reach the deficiency prong of the ineffective assistance inquiry.³ See *Smith*, 268 Wis. 2d 138, ¶15.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

³ Lange alternatively seeks a new trial in the interest of justice. This argument is speculative and adds nothing beyond his ineffective assistance of counsel argument. We therefore reject the argument.

